IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

WRIT PETITION NO.1657 OF 2006

Ram Veerbhadra Telkar & Anr. ...Petitioners.
Vs.
Mustanshir Kasam Ali Vakharia. ...Respondent.
....
Mr. P.K. Dhakephalkar i/b. Shamim & Co. for the Petitioners.
Mr. P. S. Dani for the Respondent.
.....

CORAM : DR.D.Y.CHANDRACHUD, J.

July 10, 2006.

P.C.

In a suit for the grant of an injunction, an interlocutory order of injunction was passed by the Trial Judge in the Court of Small Causes. That order has been modified by the Appellate Bench. The order of injunction which now operates is in the following terms:

> "Pending the hearing and final disposal of the suit the defendants their agents and/or servants are hereby restrained from obstructing the right of way/access of the Plaintiff, his servants and agents to use the common passage in question, bath room, cabin room in the rear side of shop No.2, Ground Floor, Mathuradas Bldg, 43/45, Colaba Causeway, Mumbai 400 039 and the said order will be applicable and in force during the period

allowed by the BMC for keeping the shops open i.e. from 9.30 a.m. to 8.30 p.m.

The defendants are hereby directed to give duplicate key of the lock of the front door of the common passage in question leading to the bath room and rear side room.

The prayers as regards temporary injunction against creation of third party interest in respect of the suit premises and erection of alluminium galvanized sheet to bifurcate the passage and the defendants shop are rejected."

The order of injunction is supported by the report of the Commissioner which would indicate that prima facie a common passage has existed in the premises which the Plaintiff-Respondent has been obstructed from using.

The first circumstance, in the evaluation of a prima facie case, is the finding of the Appellate Bench of the Court of Small Causes in a judgment dated 28th July 1972 in Appeal No.218/71 in E.A. No.397/E/1966. Admittedly the Petitioners claimed a declaration of sub tenancy in pursuance of the aforesaid judgment. The judgment of the Court of Small Causes does support the claim

of the Respondent herein that a common passage was in existence at the material time. The second circumstance is the report of the Court Commissioner which is adverted to in para 16 of the judgment of the Trial Court. The Court Commissioner's report shows that the entrance from the rear side was through a narrow *House Galli* where there drainage pipes and a persistent leakage from the of drainage line. Finally the Appellate Bench also relied upon the affidavit of Manoj R. Jariwala, the son of the previous tenant of Shop No.2. This Court cannot reappreciate the evidence. The proceedings before this Court under Article 227 of the Constitution originate from an interlocutory order.

At the same time, it would be necessary to modify the order of injunction to ensure that the need of the Respondent to maintain the safety and integrity of his shop is not disturbed. The Appellate Bench of the Court of Small Causes has directed the Petitioner to give a duplicate key of a lock of the front door of the common passage to the Respondent. In my view, in view of the direction to keep the passage open from 9.15 a.m. till 8.30 p.m., it

is not necessary to direct the Petitioners to furnish a duplicate key to the Respondent. That part of the direction is vacated. Moreover, the use of the common passage shall be restricted to the Respondent herein and to the members of his staff, not exceeding five. Counsel appearing on behalf of the Respondent has made a statement before the Court, on the instructions of the Respondent who is present in the Court, that the passage shall not be used by any of his customers and that the names of the five employees who would use the passage shall be placed on the record of the Court of Small Causes. In the event that there is any change in the name of one or more employees, intimation in that regard shall be placed on the record of the Trial Court.

The Trial Court shall dispose of the suit without regarding any of the findings contained in the impugned order or the present order as conclusive on the merits of the rival cases. With the aforesaid modification, the petition shall stand disposed of.

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